TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 262.

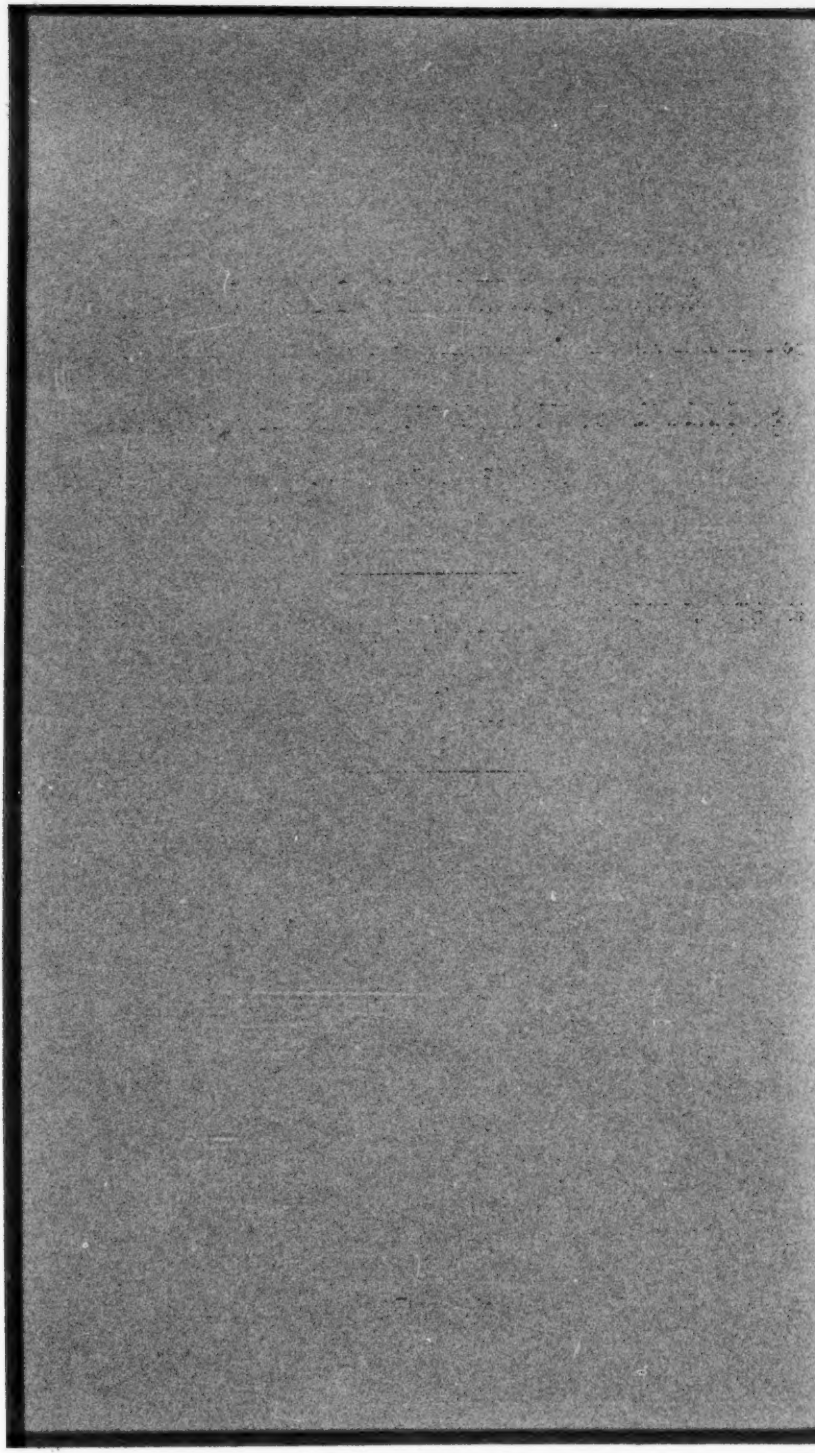
HARRY H. WEISS, COLLECTOR OF INTERNAL REVENUE, PETITIONER,

vs.

LOUIS STEARN.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR CERTIORARI FILED MARCH 20, 1923.
CERTIORARI AND RETURN FILED JULY 5, 1923.



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[Caption omitted.]

2 In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 10126.

LOUIS STEARN, PLAINTIFF,

vs.

H. H. WEISS, COLLECTOR OF INTERNAL REVENUE FOR THE EIGHTEENTH DISTRICT OF OHIO, DEFENDANT.

Petition.

Filed June 13, 1919.

Plaintiff says that the defendant, H. H. Weiss, is and was at all times hereinafter mentioned the collector of internal revenue for the eighteenth district of Ohio. Plaintiff is and was at all times hereinafter mentioned a resident of Cleveland, Ohio, in said district.

For his cause of action against the defendant, plaintiff says that he was the owner during November, 1916, of one hundred five (105) shares of common stock of the par value of one hundred dollars ($100.00) each in the National Acme Manufacturing Company, an Ohio corporation; that on or about November 18th, 1916, certain holders of the common stock of said company agreed with Eastman, Dillon and Company that each share of common stock of said company which should be deposited by the owner with the depositary named in said contract should be exchanged for one hundred fifty dollars ($150.00) in cash and five (5) shares of stock of the par value of fifty dollars ($50.00) each in a new company to be organized under the laws of Ohio to be called the National Acme Company, to which company all of the assets of the National Acme Manufacturing Company were to be forthwith transferred in exchange for its entire authorized capital stock consisting of five hundred thousand (500,000) shares of the par value of fifty dollars ($50.00) each. It was further provided by the terms of said contract that one-half of said shares of the National Acme Company were to become the property of Eastman, Dillon and Company and one-half were to be dis-
3 tributed to the stockholders of the National Acme Manufacturing Company, each stockholder receiving five (5) shares of National Acme stock for each share of the National Acme Manufacturing Company stock theretofore held by him.

Plaintiff says that said contract was performed and said exchange was made pursuant to said contract, and plaintiff received for each share of stock which he theretofore owned in the National Acme Manufacturing Company, one hundred fifty dollars ($150.00) in cash and five (5) shares of stock of the par value of fifty dollars ($50.00) each in the National Acme Company.

Plaintiff says that he did not sell or dispose of any part of said National Acme stock received in exchange during 1916; that he returned for taxation as income for 1916 the profit derived from said transaction during 1916, to-wit: the difference between one hundred fifty dollars ($150.00) per share and the cost of said the National Acme Manufacturing Company stock, believing that whatever he might afterwards receive for the National Acme stock should be returned as additional profit in the year when said profit should be realized.

The Treasury Department, however, ruled in a letter to H. H. Weiss dated March 16th, 1917, "that inasmuch as a selling price or exchange value of $300.00 was placed upon each share of the National Acme Manufacturing Company's stock at the time it was sold or exchanged for five shares of stock in the National Acme Company priced or valued at $30.00 a share and $150.00 in cash, the transaction must be regarded, for Federal income tax purposes, as the sale of the stock of the National Acme Manufacturing Company," and each stockholder of the National Acme Manufacturing Company was by said ruling required to treat the sale price of each share as three hundred dollars ($300.00) and to return the difference between three hundred dollars ($300.00) and the cost price as income.

This ruling was base on the following language in the contract between stockholders and Eastman, Dillon and Company:

"First—The vendors agree to and will sell all their said shares of common capital stock to, and the purchasers agree to and will purchase the same from them, as well as any and all shares of the common capital stock of said the National Acme Manufacturing Company, the holders of which deposit the same with the depositary hereinafter named, subject to the terms of this agreement, at
4 and for the price of three hundred dollars ($300.00) per share, payable, one-half in cash and one-half in securities, as hereinafter set forth."

Later provisions of the contract describe as the "securities" above referred to five shares of the common stock of the new company to be called the National Acme Company and to have the assets and capitalization hereinbefore described.

Plaintiff was compelled to make a new return, treating the transaction aforesaid as a sale of stock in the National Acme Manufacturing Company for three hundred dollars ($300.00) per share, whereby his tax under the revenue law of September 8th, 1916, was increased from one hundred one dollars and fourteen cents ($101.14) to five hundred fourteen dollars and thirty-three cents ($514.33), an increase of four hundred thirteen dollars and nineteen cents ($413.19).

Plaintiff made said return and paid said tax under protest to prevent the imposition of penalties threatened and attachment of his property.

Plaintiff says that prior to said exchange he was the owner, as a stockholder in the National Acme Manufacturing Company, of an undivided 105/50000ths interest in the assets of the National Acme

Manufacturing Company evidenced by one hundred five (105) shares of stock of said company, and that after said exchange he continued to be the owner of one-half of said interest in the same identical assets, i. e., an undivided 525/500000ths interest evidenced by five hundred twenty-five (525) shares of National Acme stock; that he received fifteen thousand seven hundred fifty dollars ($15,750) for the half interest which he parted with, but that the return which the defendant compelled him to make as aforesaid treated the transaction as a sale of his entire interest for $31,500.00.

On or about the 30th day of June, 1917, plaintiff filed with the Commissioner of Internal Revenue a claim for refund of said sum of four hundred thirteen dollars and nineteen cents ($413.19), said claim being an appeal to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof. The decision of the Commissioner of Internal Revenue has been delayed more than six months from the date of said appeal and plaintiff alleges on information and belief that no decision on said appeal has yet been reached or announced. No part of said tax has been repaid to plaintiff. Wherefore plaintiff brings this action in this court pursuant to the statutes of the United States, to recover said internal revenue tax illegally assessed and collected, as aforesaid.

Wherefore plaintiff asks judgment against the said H. H. Weiss, collector of internal revenue for the eighteenth district of Ohio, in the sum of four hundred thirteen dollars and nineteen cents ($413.19) with interest from the 30th day of June, 1917.

THOMPSON, HINE & FLORY,
Attorneys for Plaintiff.

[Jurat showing the foregoing was duly sworn to by Louis Stearn. Omitted in printing.]

Præcipe for summons.

To the CLERK:

Please issue summons in the above-entitled case returnable according to law, endorse the same action for money.

THOMPSON, HINE & FLORY,
Attorneys for Plaintiff.

6 In United States District Court.

Answer.

Filed July 11, 1919.

Now comes E. S. Wertz, United States attorney for the Northern District of Ohio, and for answer to the above-entitled cause of action says that he is the legal representative of H. H. Weiss, collector of internal revenue for the eighteenth district of Ohio, the defendant aforesaid, in all matters officially arising under and regarding the cause of action alleged in the petition, and further answering admits

that H. H. Weiss is and was at all times named in the petition the collector of internal revenue for the eighteenth district of Ohio, and that plaintiff was at all times named in the petition a resident of Cleveland, Ohio, in said district.

Further answering the said defendant, H. H. Weiss, collector of internal revenue for the eighteenth district of Ohio, denies each and all of the allegations of the plaintiff's petition herein, adverse to the interest of the said defendant, or the United States of America.

Wherefore, defendant prays that said petition be dismissed and that he go hence without costs.

E. S. WERTZ,
United States Attorney.

7 In United States District Court.

Stipulation.

Filed April 6, 1920.

Now comes the plaintiff by his attorneys, Thompson, Hine & Flory, and also comes the defendant by his attorney, E. S. Wertz, and consents in writing to waive the trial of the above-entitled cause to a jury, and consents to submit the issues to the court on the pleadings and the agreed statement of facts without the intervention of a jury.

THOMPSON, HINE & FLORY,
Attorneys for Plaintiff.
For the U. S. Attorney,
By JOSEPH C. BREITENSTEIN,
Attorney for Defendant.

Approved:
D. C. WESTENHAVER, *Judge.*

In United States District Court.

Order approving stipulation waiving trial to jury and submitted on agreed statement of facts.

Entered April 6, 1920, by D. C. Westenhaver, judge.

Pursuant to stipulation filed herein, it is ordered that the parties waive the trial of the above-entitled cause to a jury, and submit the issues to the court on the pleadings and agreed statement of facts, without the intervention of a jury.

8 In United States District Court.

Stipulation.

STATEMENT OF AGREED FACTS.

Filed April 9, 1920.

To obviate the necessity of taking testimony as to points not in dispute and for the purpose of this cause, the parties, plaintiff and

defendant, agree to and do hereby stipulate the following facts to be true, and consent that this cause may be heard and determined on said facts, and such additional testimony as may be offered by either party.

Defendant, H. H. Weiss, is and was at all times mentioned in the petition herein, the collector of internal revenue of the United States for the eighteenth collection district of the United States, with offices in Cleveland, Ohio.

Plaintiff is and was at all times mentioned herein, a resident of Cleveland, Ohio, in said district.

Plaintiff was the owner on November 1, 1916, of one hundred and five (105) shares of common stock, of the par value of one hundred dollars ($100) each, in the National Acme Manufacturing Company, an Ohio corporation: that, on or about November 8, 1916, a contract for the disposition of all the common stock of said company, including plaintiff's, was entered into between certain of the stockholders and Eastman, Dillon & Company—a copy of which contract is hereto attached, marked "Exhibit A" and made a part thereof by reference: that said contract was performed in accordance with the terms thereof, and plaintiff received for each share of the stock which he owned in the National Acme Manufacturing Co., one hundred and fifty ($150) dollars in cash and five (5) shares of stock of the par value of fifty ($50) dollars each in the National Acme Company the new corporation organized in accordance with the terms of the agreement above referred to: that plaintiff did not sell or dispose of any part of said National Acme stock so received during 1916; and that he returned for taxation as income for 1916 the difference between one hundred and fifty ($150) dollars per share and the cost of said National Acme Manufacturing Company stock.

That the Treasury Department ruled in a letter to the said H. H. Weiss, dated March 6th, 1917:

"That inasmuch as a selling price or exchange value of
9 $300.00 was placed upon each share of the National Acme Manufacturing Company's stock at the time it was sold or exchanged for five shares of stock in the National Acme Company priced or valued at $30.00 a share and $150.00 in cash, the transaction must be regarded for Federal income tax purposes, as the sale of the stock of the National Acme Manufacturing Company."

And each stockholder of the National Acme Manufacturing Company was by said ruling required to treat the sale price of each share as three hundred dollars ($300.00) and to return the difference between three hundrd dollars ($300.00) and the cost price as income.

That this ruling was based among other things on the following language in the contract between said stockholders and Eastman, Dillon and Company:

"First—The vendors agree to and will sell all their said shares of common capital stock to, and the purchasers agree to and will purchase the same from them, as well as any and all shares of the

common capital stock of said The National Acme Manufacturing Company, the holders of which deposit the same with the depositary hereinafter named, subject to the terms of this agreement, at and for the price of three hundred dollars ($300.00) per share, payable, one-half in cash and one-half in securities, as hereinafter set forth."

Later provisions of the contract describe as the "securities" above referred to five shares of the common stock of the new company to be called the National Acme Company and to have the assets and capitalization hereinbefore described.

That plaintiff was compelled to make a new return, treating the transaction aforesaid as a sale of stock in The National Acme Manufacturing Company for three hundred dollars ($300.00) per share, whereby his tax under the revenue law of September 8th, 1916, was increased from one hundred one dollars and fourteen cents ($101.14) to five hundred fourteen dollars and thirty-three cents ($514.33), an increase of four hundred thirteen dollars and nineteen cents ($413.19).

That plaintiff made said return and paid said tax under protest to prevent the imposition of penalties threatened and attachment of his property; that on or about the 30th day of June, 1917, plaintiff filed with the Commissioner of Internal Revenue a claim for refund of said sum of four hundred thirteen dollars and nineteen cents ($413.19); that the decision of the Commissioner of Internal Revenue was delayed more than six months from the date of said appeal and that no part of said tax has been repaid to plaintiff.

THOMPSON, HINE & FLORY,
Attorneys for Plaintiff.
E. S. WERTZ,
U. S. Attorney, Attorney for Defendant.

EXHIBIT A IN EVIDENCE.

This agreement, made by and between W. D. B. Alexander, A. W. Henn and E. C. Henn, of Cleveland, Ohio, parties of the first part, hereinafter designated as vendors, and Messrs. Eastman, Dillon & Company, of New York, parties of the second part, hereinafter designated as purchasers, is to witness:

That whereas, the vendors, are the owners of more than fourteen thousand (14,000) shares of the common capital stock of The Nation Acme Manufacturing Company of Cleveland, Ohio, organized under the laws of the State of Ohio; and

Whereas, the purchasers desire to acquire the same and such other shares as may be deposited hereunder:

Now, therefore, it is agreed:

First—The vendors agree to and will sell all their said shares of common capital stock to, and the purchasers agree to and will purchase the same from them, as well as any and all shares of the common capital stock of said The National Acme Manufacturing

Company, the holders of which deposit the same with the depositary hereinafter named, subject to the terms of this agreement, at and for the price of three hundred dollars ($300) per share, payable, one-half in cash and one-half in securities, as hereinafter set forth; provided, however, and this contract is made upon the express condition, that it shall not become operative unless, on or before December 1st, A. D. 1916, at least eighty per centum (80%) of the entire outstanding common capital stock of said company is deposited hereunder, for sale in accordance with the terms hereof, with said depositary.

Second—Vendors have exhibited to the purchasers the financial statement of said The National Acme Manufacturing Company as of date September 30th, 1916, and have stated that the combined earnings of its so-called "Windsor plant" recently acquired
11 and its other plants, during 1916, will approximate five millions of dollars ($5,000,000), during the year 1915 were approximately two millions five hundred thousand dollars ($2,500,000), and during the three years prior thereto approximately from five hundred thousand (500,000) to eight hundred thousand (800,000) dollars per annum.

The purchasers shall, on or before December 1st, 1916, complete such examination, if any, as they desire to make of the company's books and property, to verify such statements of earnings and financial condition and the title of the company's properties, and shall, on or before December 4th, advise the vendors of the result of such examination; and if no examination is made, or unless such examination, if made, disclose that such statements are not substantially correct, or that the titles of its property are defective in some serious respect not readily to be corrected, the purchasers shall proceed to pay for the deposited stock as herein provided. Provided that if the examination made by the purchasers disclose that such statements are not substantially correct, or that the title to its property are defective in some serious respect not readily to be corrected, and the transaction fail for that reason, the depositary shall forthwith return to the purchasers any moneys theretofore deposited by them hereunder, and shall return to the depositors their stock deposited with it.

Third—The vendors will, upon the execution hereof, deliver to the Cleveland Trust Company, of Cleveland, Ohio, as depositary, certificates of all their shares of the said common capital stock, duly endorsed for transfer, and subject the same to the terms of this agreement, and will make an effort to procure the deposit by all the other stockholders of said corporation of certificates of their shares of its said common capital stock, duly endorsed in blank for transfer, with said depositary, subject to the terms of this agreement, and to constitute the vendors, or a majority of them, attorneys in fact and proxies of the depositing stockholders to vote said stock in such manner as may be necessary to carry out the purposes hereof. If and whenever, on or before December 1st, 1916, the depositary shall

notify the purchasers that there has been deposited with it at least eighty per cent (80%) of all said outstanding common capital stock, the purchasers will, within five (5) days from the date of such notice, deposit with said The Cleveland Trust Company, as such depositary, at Cleveland, Ohio, or for its account at the Chase
12 National Bank in the city of New York, as it may direct, subject to the terms of this agreement, the sum of five hundred thousand dollars ($500,000) in cash, and the further sum of seven millions of dollars ($7,000,000) within ten (10) days from the date of such notice.

Fourth—The purchasers and vendors will cause to be incorporated under the laws of the State of Ohio, a manufacturing corporation, with generally similar powers to those of said The National Acme Manufacturing Company, under the corporate name of "The National Acme Company" or such other name similar thereto as the parties hereto may desire. Said corporation so to be formed shall have an authorized capital stock of twenty-five millions of dollars ($25,000,000) of common stock, divided into five hundred thousand shares, of the par value of fifty dollars ($50.00 each. Upon the organization of said proposed corporation the purchasers and vendors will cause such proceedings to be had by its stockholders and directors as will cause it to purchase all the property and assets of every kind whatsoever of said The National Acme Manufacturing Company, including the good will of its business and subject to all its outstanding contracts and liabilities, now or hereafter accrued, which are to be assumed by said new corporation and paid as they mature, in consideration of the sum of twenty-five millions of dollars ($25,000,000), payable by its entire authorized issue of stock, and to issue such stock in payment therefor.

The purchasers and vendors will use their best endeavors to cause such proceedings to be had by the stockholders and directors of said The National Acme Manufacturing Company as will cause all said property and assets, including its good will, to be sold to the newly organized company, at the price and on the terms above set forth, and full title thereto to be vested in that company and to receive in payment therefor said capital stock of the newly organized company. The purchasers and vendors will cause all the stock of said newly organized company (except nine (9) qualifying shares of directors) to be issued to the Cleveland Trust Company, depositary, or such person as it may nominate, to be held and distributed by it as hereinafter provided.

Fifth—Said The Cleveland Trust Company, depositary, shall forthwith distribute said twenty-five millions of dollars ($25,000,000) (less qualifying shares), par value, of the common capital stock of said new company, and the said sum of seven millions five hundred thousand dollars ($7,500,000) in the following manner, to wit:
13 (a) If all the common stock of said The National Acme Manufacturing Company has been deposited with it, it will assign and transfer, or cause to be assigned and transferred to the

purchasers, or their order, one-half, or two hundred and fifty thousand (250,000) shares (excluding four qualifying shares for directors), of said capital stock of said newly organized company, and will, out of said sum of seven million five hundred thousand dollars ($7,500,000), pay to each depositing stockholder an amount equal to one hundred and fifty dollars $(150.00) upon each share deposited by him. The depositary will, however, retain, with power to vote the same, the remaining one-half, or two hundred and fifty thousand (250,000) shares (excluding five qualifying shares of said stock) until May 31st, A. D. 1917 (unless and to the extent that the purchasers may consent to earlier deliveries), at the expiration of which time it will assign and transfer, or cause to be assigned and transferred, said shares to the depositing stockholders, or their assigns, pro rata.

(b) If less than the entire amount of the common capital stock of the National Acme Manufacturing Company is deposited hereunder, the depositary shall follow a similar procedure, except that it shall retain ten (10) shares (five from each one-half above named) of the capital stock of the new company, with power in itself or its nominees to vote the same, and one hundred and fifty dollars ($150.00) in money, on account of each share of stock not so deposited, until adjustment for the purchase of such non-deposited stock, under the laws of Ohio or otherwise, can be had. The purchasers shall make whatever adjustment may be necessary to acquire such non-deposited stock, and to that end may make use of the shares of stock and money retained by the depositary under the provisions hereof, at the rate of, but not exceeding one hundred and fifty dollars ($150.00) in cash and two hundred and fifty dollars ($250.00), par value, of said new stock for each share of such old stock; and when such nondeposited stocks shall have been acquired by the purchasers, the depositary shall turn over to the purchasers any shares or money then remaining in its hands; provided, however, that the vendors, if they desire, shall have the right to participate in the purchase of such nondeposited stock to the extent and upon the terms which may be deemed equitable by Messrs. A. H. Wiggin, president of the Chase National Bank of New York, and F. H. Goff, president
14 of the Cleveland Trust Company, of Cleveland, Ohio, and provided further, that in lieu of their portion of the retained stock above provided for, the purchasers may substitute and deposit such other collateral as meets the approval of said Wiggin and Goff.

Sixth—The vendors, being the active executive officers of the National Acme Manufacturing Company in the management of its business, hereby agree to accept and retain, if elected thereto, for a period of five years from and after its organization, the same officers or positions therein that they now hold in the present company, or officers or positions involving like duties, it being the desire of both parties hereto that the present management of the business be not interfered with by its transfer to the new company.

Seventh—The purchasers and vendors will, in the organization of the new company, cause its regulations to provide for a board of directors nine (9) in number, of whom four (4) shall be nominated by them and five (5) by the vendors.

Eighth—The purchasers and vendors further agree that they will cause the new corporation to make application for and use their best efforts to have its stock listed upon New York, Boston, and Cleveland Stock Exchanges, and the vendors will cooperate with them therein.

Ninth—It is represented by the vendors that the one million five hundred thousand dollars ($1,500,000) par value, of the outstanding preferred stock of the National Acme Manufacturing Company, has already been called by said company for redemption on January 1st, 1917, at the price of one hundred and five dollars ($105.00) per share and accrued dividends thereon at the rate of six per cent (6%), and they agree that said preferred stock will be in fact retired on or before the consummation of this deal, or that the cash required for such redemption will have been deposited by said company in the Cleveland Trust Company, as provided in the certificates of said preferred issue as a separate fund for the full redemption of said issue, it being distinctly understood that all, or a portion of the sum required for such redemption will or may be borrowed by said The National Acme Manufacturing Co. for the purpose, and that its liability therefor will be a part of the indebtedness assumed by the new company in the transaction hereinbefore set forth.

Tenth—It is further agreed that during the pendency of
15 this contract provided the transaction is closed on or before January 1st, 1917, no dividends will be paid on the common stock of the present company other than its regular one per cent (1%) dividend to be declared on December 13th next.

Eleventh—It is further agreed that all the expenses of the formation of the proposed new company, including placing it in such position as to in every way carry out the portions of this agreement devolving upon it, the transfer from the old company to it of its property, the vesting in the new company of full title thereto and the dissolution of the old company, which shall be effected as soon as it legally may, shall be borne by the new company. All expenses, legal or otherwise, incurred by either of the parties hereto, on their own account and for their own benefit, shall be borne respectively by them.

Twelfth—It is further agreed that the Cleveland Trust Company, named as depositary herein, may issue receipts for stocks deposited with it, in accordance with and subject to the terms of this contract.

Thirteenth—The purchasers agree that all things to be done and performed by them will be completed on or before December 31st, 1916, so that the transaction may be closed on or before that date.

Fourteenth—If, in carrying out the terms of this contract, it is deemed desirable to make any modifications therein or additions thereto, the matter shall be submitted to said Messrs. A. H. Wiggin

and F. H. Goff, who may make any such modification or addition which they deem advisable or desirable, other than change in price of the stock sold or time of payment therefor, which they have no power to modify.

In testimony whereof, said parties have hereunto affixed their signatures, this 8th day of November, A. D. 1916.

W. D. B. ALEXANDER, (signed)
A. W. HENN, (signed)
E. C. HENN, per A. W. H., (signed)
Vendors.

EASTMAN, DILLON & COMPANY.
By HERBERT LOWELL DILLON, (signed)
Purchasers.

16 CLEVELAND, OHIO, *March 22nd, 1920.*

I hereby certify that I have examined the above contract marked "Exhibit A" and compared thes ame with the original contract dated November 8, 1916, between W. D. B. Alexander, A. W. Henn and E. C. Henn, vendors, and Eastman, Dillon & Company, purchasers, and that the above copy marked "Exhibit A" is a true copy of said original contract dated November 8, 1916.

In witness whereof, I have hereunto affixed my signature and the seal of said company, this 22nd day of March, 1920.

[SEAL.] N. S. RATHBURN.
Secretary of the National-Acme Company.

In United States District Court.

Stipulation.

AMENDED STATEMENT OF FACTS.

Filed Nov. 4, 1921.

To obviate the necessity of taking testimony as to points not in dispute, and for the purpose of this cause, the parties, plaintiff and defendant, agree to and do hereby stipulate the following facts to be true, and consent that this cause may be heard and determined on said facts, and such additional testimony as may be offered by either party.

The defendant, H. H. Weiss, was at all times mentioned in the petition herein, the collector of internal revenue of the United States for the eighteenth collection district of the United States, with offices in Cleveland, Ohio.

Plaintiff is and was at all times mentioned herein, a resident of Cleveland, Ohio, in said district.

Plaintiff was the owner on November 1st, 1916, of one hundred and five (105) shares of common stock, of the par value of one hundred dollars ($100.00) each, in the National Acme Manufacturing

17 Company, an Ohio corporation having an issued capital stock of fifty thousand (50,000) shares of common stock of one hundred dollars ($100.00) each. On or about November 8th, 1916, a contract for the disposition of all the common stock of said company, including plaintiff's, was entered into between certain of the stockholders and Eastman, Dillon & Company, a copy of which contract marked "Exhibit A" is attached to the original "statement of agreed facts" heretofore filed in this cause and said contract is made a part hereof by reference. Subsequent to November 8th, 1916, said contract was performed in accordance with the terms thereof and plaintiff received for each share of the stock which he owned in the National Acme Manufacturing Company one hundred and fifty dollars ($150.00) in cash and five (5) shares of stock of the par value of fifty dollars ($50.00) each in the National Acme Company, the new corporation organized in accordance with the terms of the contract above referred to, and the assets of the National Acme Manufacturing Company were transferred to the National Acme Company, and after such transfer the National Acme Company had the same assets and liabilities as the National Acme Manufacturing Company had theretofore had and no other. Plaintiff did not, during the year 1916, sell or dispose of any part of said National Acme stock so received. He returned for taxation as income for 1916 the difference between one hundred fifty dollars ($150.00) per share and the cost of said National Acme Manufacturing Company stock.

The Treasury Department ruled in a letter to the said H. H. Weiss, dated March 6th, 1917:

"That inasmuch as a selling price or exchange value of $300.00 was placed upon each share of the National Acme Manufacturing Company's stock at the time it was sold or exchanged for five shares of stock in the National Acme Company priced or valued at $30.00 a share and $150.00 in cash, the transaction must be regarded for Federal income tax purposes, as the sale of the stock of the National Acme Manufacturing Company."

And each stockholder of the National Acme Manufacturing Company was by said ruling required to treat the sale price of each share as three hundred dollars ($300.00) and to return the difference between three hundred dollars ($300.00) and the cost price as income.

This ruling was based among other things on the following language in the contract between said stockholders and Eastman, Dillon and Company:

18 "First—The vendors agree to and will sell all their said shares of common capital stock to, and the purchasers agree to and will purchase the same from them, as well as any and all shares of the common capital stock of said The National Acme Manufacturing Company, the holders of which deposit the same with the depositary hereinafter named, subject to the terms of this agreement, at and for the price of three hundred dollars ($300.00) per share, payable, one-half in cash and one-half in securities, as hereinafter set forth."

Later provisions of the contract describe as the "securities" above referred to five shares of the common stock of the new company to

be called the National Acme Company and to have the assets and capitalization hereinbefore described.

Plaintiff was compelled to make a new return, treating the transaction aforesaid as a sale of stock in the National Acme Manufacturing Company for three hundred dollars ($300.00) per share, whereby his tax under the revenue law of September 8th, 1916, was increased. It is stipulated that if the court should find that the only taxable income realized from the disposition of each share of National Acme Manufacturing Company stock was the difference between the entire cost of each share and the cash (i. e. $150.00) received in exchange for such share, judgment should be entered in favor of plaintiff for three hundred forty-five and 67/100 dollars ($345.67), this being the amount of taxes collected by defendant from plaintiff in excess of the amount which was lawfully due if plaintiff's taxable income from the disposition of each share of National Acme Manufacturing Company stock was the difference between the entire cost of each share and the cash received in exchange therefor. If the court should find that the taxable income realized from the disposition of each share of said stock was the difference between one-half the cost of such share and the cash received therefor, judgment should, in such event, be rendered in favor of plaintiff for two hundred sixty-eight and 89/100 dollars ($268.89), such amount being the sum collected by defendant from plaintiff in excess of the amount lawfully due if the only taxable income realized from the disposition of each share of National Acme Manufacturing Company stock was the difference between one-half the cost of such share and the cash received therefor. This stipulation as to the amount for which judgment should be rendered in certain events is for the convenience of the court in order to save detailed
19 evidence as to the items of the return, without prejudice to the right of either party, prosecute error from any judgment which may be rendered.

Plaintiff made said new return and paid said tax to the defendant under protest to prevent the imposition of penalties threatened and attachment of his property. On or about the 30th day of June, 1917, plaintiff filed with the Commissioner of Internal Revenue a claim for refund of the sum of four hundred thirteen and 19/100 dollars ($413.19), the amount by which plaintiff claimed his tax had been unlawfully increased by reason of the ruling of the Treasury Department hereinbefore referred to. Said claim was an appeal to the Commissioner of Internal Revenue according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof. The decision of the Commissioner of Internal Revenue was delayed more than six (6) months from the date of filing said appeal and no part of said tax has been repaid to plaintiff.

THOMPSON, HINE & FLORY,
Attorneys for Plaintiff.

E. S. WERTZ,
U. S. Attorney, Attorney for Defendant.

In United States District Court.

Submission of cause.

Entered November 10, 1921, by D. C. Westenhaver, Judge.

This day came the parties, by their attorneys, and a jury having been waived, this case was argued by counsel, submitted to the court on the pleadings and the evidence, and taken under advisement by the court.

20 In United States District Court.

Motion.

Filed Nov. 10, 1921.

Now comes the plaintiff and moves the court for a finding of fact finding for the plaintiff on all the issues joined, and for a finding that prior to the transactions set forth in the petition plaintiff was the owner as a stockholder in the National Acme Manufacturing Company, of an undivided 105/50000 interest in the assets of said company, evidenced by one hundred and five shares of stock of said company, and that after said exchange he continued to be the owner of one-half of said interest in the same identical assets, i. e. an undivided 525/500000 interest, evidenced by five hundred and twenty-five shares of National Acme stock, and that the only income realized by the plaintiff from the transactions set forth in the petition, and proved by the evidence, was the cash received for said National Acme Manufacturing Company stock (i. e. fifteen thousand seven hundred and fifty dollars ($15,750.00) less the cost of such stock or less one-half the cost of such stock.

All of the above findings are requested on the ground that there is no substantial evidence to sustain any other conclusion.

Plaintiff moves the court to find as a conclusion of law that plaintiff received no taxable income from the transactions set forth in the petition in excess of fifteen thousand seven hundred and fifty dollars ($15,750.00), less either the cost of said stock, or one-half the cost of said stock, and that plaintiff is entitled to judgment against the defendant in the sum of three hundred forty-five and 67/100 dollars ($345.67), or two hundred sixty-eight and 89/100 dollars ($268.89) with interest from the 30th day of June, 1917.

THOMPSON, HINE & FLORY,
Attorneys for Plaintiff.

21 In United States District Court.

Opinion.

Filed Feb. 17, 1922.

WESTENHAVER, District Judge:

This is an action brought to recover income taxes paid under protest. The parties, by stipulation in writing, have waived their right to a jury trial and have submitted the case to the court in lieu of a jury, upon an agreed statement of facts. The original agreed statement of facts filed herein April 9, 1920, as supplemented and amended by further agreement filed herein November 4, 1921, is adopted as my findings of fact and ordered to be filed as a part of the record. I have given due consideration to the questions involved, but my obligations in other directions are such that I shall do no more by way of opinion than to state briefly my conclusions. Whether or not the plaintiff is entitled to recover depends upon the correct understanding and meaning of the agreement in writing dated November 8, 1916, executed by W. D. B. Alexander, A. W. Henn and E. C. Henn, parties of the first part, and Eastman, Dillon & Company, of New York, parties of the second part. It is the Government's contention that this transaction as therein agreed and as carried out was in substance and legal effect a sale by the first parties and all of the stockholders of the National Acme Manufacturing Company of their stock in said company, to the parties of the second part, at an agreed valuation of $300 a share, of which $150 was to be paid, in cash and the residue in securities of a new and independent corporation to be organized and called the National Acme Company. This being so, the Government further contends that the profit made by each stockholder on the sale of its stock is income and that the amount of this profit is to be ascertained by adopting $300 a share as the sale price and deducting therefrom the cost to the stockholder of his stock, if bought since March 1, 1913, or the market value on March 1, 1913, if bought before that date. The plaintiff was a stockholder who participated on the basis set forth in said agreement.

All counsel agree that the substance and not the form of the transaction is controlling, and that the court will and must look through the machinery and verbiage in order to ascertain the true substance and nature of the transaction. Having done this, I am of opinion that the contention of the Government is not sound. The

22 real transaction was a sale by the stockholders of the old company to Messrs. Eastman, Dillon & Company of a one-half interest in their shares of stock and a reorganization by the old stockholders and Eastman, Dillon & Company, of the corporation, the substance and legal effect of which was to leave all stockholding interests and all the corporate assets in precisely the same situation after the transaction was fully carried out as it was when it was

begun. Exhibit A is an agreement not between the old corporation and the new corporation but between the stockholders of the old corporation and persons desirous of purchasing a one-half interest therein. The parties contemplated an increase of the capital stock from a par value of five million to a par value of twenty-five million and a reduction in the par value of each share from one hundred dollars a share to fifty dollars a share. In actual fact, this is all that was done or accomplished except the purchase by Eastman, Dillon & Company of one-half of the shares of the old company for $7,500,000. In order to accomplish this result and avoid legal difficulties, the transaction it was contemplated, when the agreement was made, was to take the form of a transfer from the old company to the new company of all the corporate assets. The new company was to have the same management and to be chartered for the same objects and purposes and under the laws of the same State. The result in substance and legal effect is the same as if the shares had merely been transferred on the books of the old company to Eastman, Dillon & Company and thereafter an amendment made and filed to the charter of the old company reducing the par value of each of its shares from one hundred dollars to fifty dollars and increasing the par value thereof from five million to twenty-five million dollars. The only reason why this course was not adopted is that probably greater difficulties would have been encountered in showing that the new stock to be issued on the basis of five for one had in fact been fully paid up.

All this appears from the terms of the agreement and the agreed statement of facts. The stockholders of the old company, it must be held, sold one-half of their shares of stock to Eastman, Dillon & Company. They received therefor the sum of $150 in cash. They had no option of taking $300 in cash or of getting anything else except an increased number of shares of reduced par value as a result of the changes in corporate form and organization. Neither the new nor the old corporation parted with any of its property as a
23 result of these transactions. The stockholders of the old company received no part of the assets of the old corporation. Nor did said corporation receive anything from the new to distribute from the old as a part of its surplus or capital for distribution among stockholders.

This being the true substance and legal effect of the agreement and of the transactions under consideration, it follows that the income derived or gained by plaintiff, and other stockholders similarly situated, from his stock in the old company, or as a result of the sale made thereof, is the cash received by him less the cost of each share to him. Upon this basis it is agreed that the income tax assessed and collected, exceeds what should have been assessed and collected, by the sum of $268.89. Judgment will be entered accordingly. An exception may be noted.

Upon the law as applied to these facts, the case falls within the principles and holdings of the following authorities: Towne vs.

Eisner, 245 U. S. 418; Southern Pacific Co. vs. Lowe, 247 U. S. 330; Gulf Oil Corpn. vs. Lewellyn, 248 U. S. 71, 72; Eisner vs. Macomber, 252 U. S. 189; Alpha Portland Cement Co. vs. United States (3 C. C. A.), Fed. 339. See also Montgomery on Income Tax Procedure, ed. 1918, pp. 95–98.

The case does not, in my opinion, fall within the principle and holdings of the authorities relied on by the Government, namely, Peabody vs. Eisner, 247 U. S. 347; Lynch vs. Hornby, 247 U. S. 339; Rockefeller vs. U. S., decided by U. S. Supreme Court November 21, 1921; United States vs. Phellis, decided by U. S. Supreme Court November 21, 1921.

The principles distinguishing these two classes of cases are definite and well understood. The difficulty, as usual, arises in applying them to the facts of a given case and determining in the light thereof by which set of principles the given case is controlled. The distinguishing characteristic, however, is that the existing corporation must have segregated and placed within the exclusive control of the stockholders some part of its corporate assets, particularly of its profits or accumulated surplus, for, if the dividend is properly to be regarded as a liquidation of capital, then it is not to be regarded as income. In the present case nothing of this kind was done. Plaintiff, and stockholders similarly situated, as already said, received purchase money for a sale of their stock from Eastman, Dillon & Company, but nothing from the corporate assets of either company. Of the cases relied on by the Government, the case
24 closest to the border line upon the facts is the Phellis case, but Mr. Justice Pitney emphasizes the characteristic thus noted as the basis of the court's decision. For instance, the old company, a New Jersey corporation, he says, "had accumulated an excess of assets over liabilities showing a surplus of accumulated profits: the precise amount is not important except that it should be stated that it was sufficient to cover the dividend distribution presently to be mentioned." Of the reorganization or merger of the corporations he says: "It was a part of the purpose and a necessary result of the plan of reorganization, as carried out, that common stock of the new company to the extent of $58,854,200 should be turned over to the old company, treated by it as assets to be distributed as against its liability to stockholders for accrued surplus, and thereupon distributed to them 'as a dividend.' The assent of the stockholders was based upon this as a part of the plan." And, concluding, he says: "It thus appears that in substance and fact, as well as in appearance, the dividend received by claimant was a gain, a profit, derived from his capital interest in the old company, not in liquidation of the capital but in distribution of accumulated profits of the company; something of exchangeable value produced by and proceeding from his investment therein, severed from it and drawn by him for his separate use. Hence it constituted individual income within the meaning of the income tax law, as clearly as was the case in Peabody vs. Eisner, 247 U. S. 347." An examination of

this case thus cited in support will make plain the ground upon which this case is to be distinguished from the Phellis case.

D. C. WESTENHAVER, *Judge.*

FEBRUARY 17, 1922.

25 In United States District Court.

Motion for a new trial.

Filed May 6, 1922.

Now comes the defendant herein and moves the court for a new trial of the above entitled cause for the following reasons, materially affecting the defendant's substantial rights:

First.

That the decision and judgment of the court is contrary to law.

Second.

That the decision and judgment of the court was given for the plaintiff herein when it should have been given for the defendant.

E. S. WERTZ,
United States Attorney,
Attorney for Defendant.

Order overruling same as of May 6, 1922, may be entered.

D. C. WESTENHAVER, *Judge.*

In United States District Court.

Order overruling motion for new trial.

Entered May 6, 1922, by D. C. Westenhaver, Judge.

This day this cause came on to be heard on the motion of defendant for a new trial and was submitted to the court, on consideration thereof the court overruled said motion, to which ruling of the court defendant, by his attorney, excepts.

It is further ordered by the court that the defendant have fifty (50) days in which to prepare, settle, and file his bill of exceptions in accord with general rule No. 38.

26 In United States District Court.

Judgment.

Entered May 6, 1922, by D. C. Westenhaver, Judge.

This cause came on to be heard upon the petition of the plaintiff, the answer of the defendant, and upon the statement of agreed facts

and the amended statement of facts heretofore agreed to by the plaintiff and defendant, and upon argument of counsel of the parties and a trial by jury having been waived by the parties; and the court, being fully advised in the premises, finds for the plaintiff and hereby awards and enters judgment for the plaintiff in the amount of three hundred and forty-six and 71/100 dollars ($346.71).

In United States District Court.

Findings of fact.

The court makes this the following findings of fact:

The defendant, H. H. Weiss, was, at all times mentioned in the petition herein, the collector of internal revenue of the United States for the eighteenth collection district of the United States, with offices in Cleveland, Ohio.

Plaintiff is, and was at all times mentioned herein, a resident of Cleveland, Ohio, in said district.

Plaintiff was the owner on November 1, 1916, of one hundred and five (105) shares of common stock, of the par value of one hundred dollars ($100) each, in the National Acme Manufacturing Company, an Ohio corporation, having an issued capital stock of fifty thousand (50,000) shares of common stock, of one hundred dollars ($100) each. On or about November 8, 1916, a contract for the disposition of all the common stock of said company, including plaintiff's, was entered into between certain of the stockholders and Eastman, Dillon & Company, a copy of which contract is as follows:

"This agreement, made by and between W. D. B. Alexander, A. W. Henn and E. C. Henn, of Cleveland, Ohio, parties of the first part, hereinafter designated as vendors, and Messrs. Eastman, Dillon & Company, of New York, parties of the second part, hereinafter designated as purchasers, is to witness, that

"Whereas, the vendors are the owners of more than fourteen thousand (14,000) shares of the common capital stock of the National Acme Manufacturing Company of Cleveland, Ohio, organized under the laws of the State of Ohio; and

27 "Whereas, the purchasers desire to acquire the same and such other shares as may be deposited hereunder:

"Now, therefore, it is agreed:

"First—The vendors agreed to and will sell all their said shares of common capital stock to, and the purchasers agree to and will purchase the same from them, as well as any and all shares of the common capital stock of said The National Acme Manufacturing Company, the holders of which deposit the same with the depositary hereinafter named, subject to the terms of this agreement, at and for the price of three hundred dollars ($300) per share, payable, one-half in cash and one-half in securities, as hereinafter set forth; provided, however, and this contract is made upon the express condition, that it shall not become operative unless, on or before Decem-

ber 1, A. D. 1916, at least eighty per centum (80%) of the entire outstanding common capital stock of said company is deposited hereunder for sale, in accordance with the terms hereof, with said depositary.

"Second—Vendors have exhibited to the purchasers the financial statement of said The National Acme Manufacturing Company as of date September 30th, 1916, and have stated that the combined earnings of its so-called 'Windsor plant,' recently acquired, and its other plants, during 1916, will approximate five million of dollars ($5,000,000), during the year 1915 were approximately two millions five hundred thousand dollars ($2,500,000) and during the three years prior thereto approximately from five hundred thousand (500,000) to eight hundred thousand (800,000) dollars per annum.

"The purchasers shall, on or before December 1st, 1916, complete such examination, if any, as they desire to make of the company's books and property, to verify such statements of earnings and financial condition and the title of the company's properties, and shall, on or before December 4th, advise the vendors of the result of such examination; and, if no examination is made, or unless such examination, if made, disclose that such statements are not substantially correct, or that the titles of its property are defective in some serious respect not readily to be corrected, the purchasers shall proceed to pay for the deposited stock as herein provided. Provided that, if the examination made by the purchasers disclose that such statements are not substantially correct, or that the titles to its property are defective in some serious respect not readily to be corrected, and the transaction fails for that reason, the depositary shall forthwith return to the purchasers any moneys theretofore deposited by them hereunder, and shall return to the depositors their stock deposited with it.

"Third—The vendors will, upon the execution hereof, deliver to the Cleveland Trust Company, of Cleveland, Ohio, as depositary, certificates of all their shares of the said common capital stock, duly endorsed for transfer, and subject the same to the terms of this agreement, and will make an effort to procure the deposit by all the other stockholders of said corporation of certificates of their shares of its said common capital stock, duly endorsed in blank for transfer, with said depositary, subject to the terms of this agreement, and to constitute the vendors, or a majority of them, attorneys in fact and proxies of the depositing stockholders to vote said stock in such manner as may be necessary to carry out the purposes hereof. If and whenever, on or before December 1st, 1916, the depositary shall notify the purchasers that there has been deposited with it at least eighty per cent (80%) of all said outstanding common capital stock, the purchasers will, within five (5) days from the date of such notice, deposit with said The Cleveland Trust Company, as such depositary, at Cleveland, Ohio, or for its account at the Chase National Bank in the city of New York, as it may direct, subject to

the terms of this agreement, the sum of five hundred thousand dollars ($500,000) in cash and the further sum of seven millions of dollars ($7,000,000) within ten (10) days from the date of such notice.

"Fourth—The purchasers and vendors will cause to be incorporated under the laws of the State of Ohio a manufacturing corporation, with generally, similar powers to those of said The National Acme Manufacturing Company, under the corporate name of the National Acme Company, or such other name similar thereto as the parties hereto may desire. Said corporation so to be formed shall have an authorized capital stock of twenty-five millions of dollars ($25,000,000) of common stock, divided into five hundred thousand shares, of the par value of fifty dollars ($50.00) each. Upon the organization of said proposed corporation the purchasers and vendors will cause such proceedings to be had by its stockholders and directors as will cause it to purchase all the property and assets, of every kind whatsoever, of said The National Acme Manufacturing Company, including the good will of its business, and subject to all its outstanding contracts and liabilities now or hereafter
29 accrued, which are to be assumed by said new corporation and paid as they may mature, in consideration of the sum of twenty-five millions of dollars ($25,000,000), payable by its entire authorized issue of stock, and to issue such stock in payment therefor.

"The purchasers and vendors will use their best endeavors to cause such proceedings to be had by the stockholders and directors of said The National Acme Manufacturing Company as will cause all said property and assets, including its good will, to be sold to the newly organized company, at the price and on the terms above set forth, and full title thereto to be vested in that company, and to receive in payment therefor said capital stock of the newly organized company. The purchasers and vendors will cause all the stock of said newly organized company (except nine (9) qualifying shares of directors) to be issued to the Cleveland Trust Company, depositary, or such person as it may nominate, to be held and distributed by it as hereinafter provided.

"Fifth—Said The Cleveland Trust Company, depositary, shall forthwith distribute said twenty-five millions of dollars ($25,000,000) (less qualifying shares), par value, of the common capital stock of said new company and the said sum of seven millions five hundred thousand dollars ($7,500,000), in the following manner, to wit:

"(a) If all the common stock of said The National Acme Manufacturing Company has been deposited with it, it will assign and transfer, or cause to be assigned and transferred, to the purchasers, or their order, one-half, or two hundred and fifty thousand (250,000) shares (excluding four qualifying shares for directors), of said capital stock of said newly organized company, and will, out of said sum of seven million five hundred thousand dollars ($7,500,000), pay to each depositing stockholder an amount equal to one hundred

and fifty dollars ($150) upon each share deposited by him. The depositary will, however, retain power to vote the same, the remaining one-half, or two hundred and fifty thousand (250,000) shares (excluding five qualifying shares of said stock) until May 31st, A. D. 1917 (unless and to the extent that the purchasers may consent to earlier deliveries), at the expiration of which time it will assign and transfer, or cause to be assigned and transferred, said shares to the depositing stockholders, or their assigns, pro rata.

"(b) If less than the entire amount of the common capital
30 stock of The National Acme Manufacturing Company is deposited hereunder, the depositary shall follow a similar procedure, except that it shall retain ten (10) shares (five from each one half above named) of the capital stock of the new company, with power in itself, or its nominees, to vote the same, and one hundred and fifty dollars ($150.00) in money, on account of each share of stock not so deposited, until adjustment for the purchase of such nondeposited stock, under the laws of Ohio, or otherwise, can be had. The purchasers shall make whatever adjustment may be necessary to acquire such nondeposited stock, and to that end may make use of the shares of stock and money retained by the depositary under the provisions hereof, at the rate of, but not exceeding one hundred and fifty dollars ($150) in cash and two hundred and fifty dollars ($250) par value of said new stock for each share of such old stock; and when such nondeposited stocks shall have been acquired by the purchasers the depositary shall turn over to the purchasers any shares or money then remaining in its hands; provided, however, that the vendors, if they desire, shall have the right to participate in the purchase of such nondeposited stock to the extent and upon the terms which may be deemed equitable by Messrs. A. H. Wiggin, president of the Chase National Bank of New York, and F. H. Goff, president of The Cleveland Trust Company, of Cleveland, Ohio; and provided further, that in lieu of their portion of the retained stock above provided for, the purchasers may substitute and deposit such other collateral as meets the approval of said Wiggin and Goff.

"Sixth—The vendors, being the active executive officers of The National Acme Manufacturing Company, in the management of its business, hereby agree to accept and retain, if elected thereto, for a period of five years from and after its organization, the same officers or positions therein that they now hold in the present company, or officers or positions involving like duties, it being the desire of both parties hereto that the present management of the business be not interfered with by its transfer to the new company.

"Seventh—The purchasers and vendors will, in the organization of the new company, cause its regulations to provide for a board of directors, nine (9) in number, of whom four (4) shall be nominated by them and five (5) by the vendors.

"Eighth—The purchasers and vendors further agree that
31 they will cause the new corporation to make application for

and use their best efforts to have its stock listed upon New York, Boston, and Cleveland Stock Exchanges, and the vendors will cooperate with them therein.

"Ninth—It is represented by the vendors that the one million five hundred thousand dollars ($1,500,000) par value of the outstanding preferred stock of the National Acme Manufacturing Company has already been called by said company for redemption on January 1st, 1917, at the price of one hundred and five dollars ($105) per share, and accrued dicidends thereon at the rate of six per cent (6%), and they agree that said preferred stock will be in fact retired on or before the consummation of this deal, or that the cash required for such redemption will have been deposited by said company in the Cleveland Trust Company, as provided in the certificates of said preferred issue, as separate fund for the full redemption of said issue, it being distinctly understood that all, or a portion, of the sum required for such redemption will or may be borrowed by said The National Acme Manufacturing Company for the purpose, and that its liability therefor will be a part of the indebtedness assumed by the new company in the transaction hereinbefore set forth.

"Tenth—It is further agreed that during the pendency of this contract, provided the transaction is closed on or before January 1st, 1917, no dividends will be paid on the common stock of the present company, other than its regular one per cent (1%) dividend to be declared on December 13th next.

"Eleventh—It is further agreed that all the expenses of the formation of the proposed new company, including placing it in such position as to in every way carry out the portions of this agreement devolving upon it, the transfer from the old company to it of its property, the vesting in the new company of full title thereto and the dissolution of the old company, which shall be effected as soon as it legally may, shall be borne by the new company. All expenses, legal or otherwise, incurred by either of the parties hereto, on their own account and for their own benefit, shall be borne, respectively, by them.

"Twelfth—It is further agreed that the Cleveland Trust Company, named as depositary herein, may issue receipts for stocks deposited with it, in accordance with any subject to the terms of this contract.

"Thirteenth—The purchasers agree that all things to be
32 done and performed by them will be completed on or before December 1st, 1916, so that the transaction may be closed on or before that date.

"Fourteenth—If, in carrying out the terms of this contract, it is deemed desirable to make any modifications therein or additions thereto, the matter shall be submitted to said Messrs. A. H. Wiggin and F. H. Goff, who may make any such modification or addition which they deem advisable or desirable, other than change in price

of the stock sold or time of payment therefor, which they have no power to modify.

"In testimony whereof, said parties have hereunto affiixed their signatures, this 8th day of November, A. D. 1916.

"W. D. B. ALEXANDER, (signed)
"A. W. HENN, (signed)
"E. C. HENN, per A. W. H., (signed)
Vendors.

"EASTMAN, DILLON & COMPANY,
"By HERBERT LOWELL DILLON, (signed)
Purchasers."

Subsequent to November 8, 1916, said contract was performed in accordance with the terms thereof and plaintiff received for each share of the stock which he owned in the National Acme Manufacturing Company one hundred fifty dollars ($150) in cash and five (5) shares of stock, of the par value of fifty dollars ($50) each, in the National Acme Company, the new corporation organized under the laws of the State of Ohio, with the same objects and purposes as those of the old company, all of which was done in accordance with the terms of the contract above referred to, and the assets of the National Acme Manufacturing Company were transferred to the National Acme Company, and after such transfer the National Acme Company had the same assets and liabilities as the National Acme Manufacturing Company had theretofore had and no other. Plaintiff did not during the year 1916 sell or dispose of any part of said The National Acme Company stock so received. He returned for taxation as income for 1916 the difference between one hundred fifty dollars ($150.00) per share and the cost of said The National Acme Manufacturing Company stock.

The Treasury Department ruled in a letter to the said H. H. Weiss, dated March 6, 1917:

"That inasmuch as a selling price or exchange value of
33 $300.00 was placed upon each share of the National Acme Manufacturing Company's stock at the time it was sold or exchanged for five shares of stock in the National Acme Company, priced or valued at $30.00 a share, and $150.00 in cash, the transaction must be regarded, for Federal income tax purposes, as the sale of the stock of the National Acme Manufacturing Company."

And each stockholder of the National Acme Manufacturing Company was by said ruling required to treat the sale price of each share as three hundred dollars ($300.00) and to return the difference between three hundred dollars ($300.00) and the cost price as income.

This ruling was based, among other things, on the following language in the contract between said stockholders and Eastman, Dillon & Company:

"First—Vendors agree to and will sell all their said shares of common capital stock to, and the purchasers agree to and will purchase the same from them, as well as any and all shares of the common capital stock of said The National Acme Manufacturing Com-

pany, the holders of which deposit the same with the depositary hereinafter named, subject to the terms of this agreement, at and for the price of three hundred dollars ($300.00) per share, payable one-half in cash and one-half in securities, as hereinafter set forth."

Later provisions of the contract described as the "securities" above referred to five shares of the common stock of the new company, to be called the National Acme Company, and to have the assets and capitalization hereinbefore described.

Plaintiff was compelled to make a new return, treating the transaction aforesaid as a sale of stock in the National Acme Manufacturing Company for three hundred dollars ($300.00) per share, whereby his tax under the revenue act of September 8, 1916, was increased to $514.33, which amount was paid by plaintiff on June 11, 1917. If the only taxable income realized from the disposition of each share of the National Acme Manufacturing Company stock was the difference between the entire cost of each share and the cash (namely $150.00 per share) received in exchange for such share, the amount of the overpayment of taxes was $345.67. If the taxable income realized from the disposition of each share of said stock was the difference between one-half of the cost of such share and the cash received therefor, the amount of taxes overpaid by plaintiff in such case was $268.89.

The court further finds that the plaintiff made said new return
34 and paid said tax to the defendant under protest to prevent the imposition of penalties threatened and attachment of his property. On or about the 30th day of June, 1917, plaintiff filed with the Commissioner of Internal Revenue a claim for refund of the sum of four hundred thirteen and 19/100 dollars ($413.19), the amount by which plaintiff claimed his tax had been unlawfully increased by reason of the ruling of the Treasury Department hereinbefore referred to. Said claim was an appeal to the Commissioner of Internal Revenue according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof. The decision of the Commissioner of Internal Revenue was delayed more than six (6) months from the date of filing said appeal and no part of said tax has been repaid to plaintiff.

In United States District Court.

Findings of law.

The court finds as a conclusion of law that the plaintiff, as a stockholder of said The National Acme Manufacturing Company, by virtue of the aforesaid transaction, in legal effect, sold one-half of his shares of stock in said The National Acme Manufacturing Company to Eastman, Dillon & Company, and that the only income derived or gained by plaintiff from his stock in said The National Acme Manufacturing Company as a result of the sale made thereof was the cash received by him, less the cost to him of the stock so sold, that is, less the cost of one-half of the stock owned by him prior to said reorganization. Upon this basis the court finds that the income tax assessed and collected exceeds what should have been assessed and collected, by the sum of two hundred sixty-eight and 89/100 dollars

($268.89). The court further finds that the plaintiff is entitled to recover interest upon this amount so overpaid from the date of overpayment to the first day of this term of court, at the rate of six per cent (6%) per annum, said interest amounting to seventy-seven and 82/100 dollars ($77.82), so that the total amount for which plaintiff should recover judgment is three hundred forty-six and 71/100 dollars ($346.71).

It is further ordered that a certificate issue to said defendant, Harry H. Weiss, of probable cause for the collection of the amount exacted.

To all of which finds of law and fact both parties except.

35 In United States District Court.

Petition for writ of error.

Filed May 13, 1922.

Now comes Harry H. Weiss, defendant herein, and says that on or about the 6th day of May, A. D. 1922, this court entered judgment herein in favor of plaintiff and against this defendant in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will appear more in detail from the assignment of errors which is filed with this petition.

Wherefore this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Sixth Judicial Circuit for the correction of errors so complained of and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

EDWIN S. WERTZ,
U. S. Attorney,
BERKELEY W. HENDERSON,
Asst. U. S. Attorney,
Attorneys for Defendant.

36 In United States District Court.

Assignment of errors.

Filed May 13, 1922.

Harry H. Weiss, defendant in this action in connection with his petition for a writ of error, makes the following assignment of errors which he avers occurred upon the trial of the cause, that is to say:

First.

The court erred in rendering judgment for the plaintiff and against this defendant when judgment ought to have been in favor of this defendant and against the plaintiff.

Second.

The court erred in finding, as a conclusion of law, that the plaintiff as a stockholder of the National Acme Manufacturing Company in legal effect sold one-half of his shares of stock in said The National Acme Manufacturing Company to Eastman, Dillon & Company, and that the only income derived or gained by the plaintiff from his stock in said The National Acme Manufacturing Company, as a result of the sale made thereof, was the cash received by him, less the cost to him of the stock so sold, that is, less the cost of one-half of the stock owned by him prior to said reorganization.

Third.

The court erred in finding that the income tax assessed and collected from the plaintiff by this defendant exceeded what should have been assessed and collected by the sum of two hundred sixty-eight dollars ($268.89) and eighty-nine cents.

Fourth.

The court erred in finding that the plaintiff was entitled to recover interest upon the amount so found to have been overpaid.

Fifth.

The court erred in overruling defendant's motion for a new trial in this cause.

Wherefore this defendant prays that the judgment may be reversed.

EDWIN S. WERTZ,
U. S. Attorney,
BERKELEY W. HENDERSON,
Asst. U. S. Attorney,
Attorneys for Defendant.

37 In United States District Court.

Order allowing writ of error.

Entered May 13, 1922, by D. C. Westenhaver, Judge.

On this 13th day of May, A. D. 1922, the above-named defendant, appearing by Edwin S. Wertz, United States attorney for the northern district of Ohio, and filing herein and presenting to the court his petition praying for the allowance of a writ of error and assignments of error intended to be urged by him, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, be sent to the United States Circuit Court of Appeals for the Sixth Judicial

Circuit, and that such other and further proceedings may be had as may be proper in the premises.

Now on consideration thereof, the court does allow the writ of error as prayed in the petition of the defendant, without bond of the defendant, it appearing that the above entitled cause is one in which the United States, and not the record defendant, is the real party in interest, and this appeal is being taken by direction of the Department of Justice of the United States of America.

38 *Writ of error.*

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

The President of the United States, to the honorable the Judge of the District Court of the United States for the Northern District of Ohio, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Louis Stearn, plaintiff, and Harry H. Weiss, collector of internal revenue for the eighteenth district of the State of Ohio, defendant, a manifest error hath happened, to the great damage of the said Harry H. Weiss, collector of internal revenue for the eighteenth district of the State of Ohio, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in said circuit, on the* 11th day of June next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable William Howard Taft, Chief Justice of the United States, the 12th day of May, in the year of our Lord one thousand nine hundred and twenty-two, and of the independence of the United States of America the one hundred and forty-sixth.

B. C. MILLER,
Clerk of the District Court of the United States for the Northern District of Ohio.
By M. E. BAUMAN,
Deputy Clerk.

(Seal.)

39 Allowed by D. C. Westenhaver, judge of the District Court.

*Not exceeding 30 days from the day of signing the citation.

[Blank return on writ of error form omitted in printing.]

40 [Citation in usual form showing service on Thompson, Hine & Flory omitted in printing.]

41 In United States District Court.

Stipulation re transcript of record.

Filed May 18, 1922.

In accordance with section 7 of rule 44 of the general rules of this court, it is hereby agreed that the record as presented to the clerk by the printer, may be certified by the clerk as required by law and the rules of the Appellate Court, as a true, full and complete copy of the original pleadings, papers, and orders used on the trial of this cause, as set forth in the precipe for transcript, without further comparison by the clerk.

THOMPSON, HINE & FLORY,
Attorneys for Plaintiff.
E. S. WERTZ,
U. S. Attorney,
BERKELEY W. HENDERSON,
Asst. U. S. Attorney,
Attorneys for Defendant.

In United States District Court.

Certificate of probable cause.

Filed May 22, 1922.

Under the provisions of section 989, Revised Statutes of the United States, it is hereby certified that probable cause existed for the collection by Harry H. Weiss, as collector of internal revenue for the eighteenth collection district of the United States, located in Cleveland, Ohio, of the income tax in question in the above-entitled cause from the plaintiff herein, and that in so collecting said income tax, said Harry H. Weiss acted under and by direction of the Commissioner of Internal Revenue of the United States.

D. C. WESTENHAVER, *Judge.*

42 In United States District Court.

Precipe for transcript.

Filed May 26, 1922.

To the CLERK:

Please prepare transcript of record for the Circuit Court of Appeals in the above-entitled cause, and include therein the following papers and orders:

Petition and precipe filed.
Answer filed.
Stipulation and order approving stipulation waiving trial to jury and submitted on agreed statement of facts filed and entered.
Stipulation, statement of agreed facts, filed.
Stipulation as to amended statement of facts filed.
Trial in progress, jury waived, final hearing to court taken under advisement ent.
Motion by plaintiff for a finding of fact filed.
Memorandum opinion of court filed.
Motion for new trial (copy furnished).
Order of findings of fact, etc., exceptions both sides noted, filed and ent.
Petition for writ of error filed.
Assignment of error filed.
Order allowing writ of error filed and entered.
Writ of error issued.
Citation issued.
Stipulation as to printing record filed.
Certificate of probably cause filed.
And deliver all papers to the Toledo Legal Printing Company for printing.

EDWIN S. WERTZ,
U. S. Attorney,
and BERKELEY W. HENDERSON,
Asst. U. S. Attorney,
Attorneys for Defendant.

43 In United States District Court.

Order to extend time.

Filed June 10, 1922.

On application of defendant and for good cause shown, it is ordered that the time for filing the transcript of record in the United States Circuit Court of Appeals be extended to July 11, 1922.

Enter.

_____,
U. S. District Judge.

In United States District Court.

Order to extend time.

Filed July 10, 1922.

On application of defendant and for good cause shown it is ordered that the time for filing the transcript of record in the United States Circuit Court of Appeals be extended to August 10, 1922.

Enter.

_____,
U. S. District Judge.

44 In United States District Court.

Certificate of clerk.

NORTHERN DISTRICT OF OHIO, *ss:*

I, B. C. Miller, clerk of the District Court of the United States for said district, do hereby certify that the annexed and foregoing pages contain a full, true, and complete copy of the final record, including the petition for a writ of error, assignment of errors and all proceedings in said cause, in accordance with the praecipe for transcript filed by plaintiff in error, the originals of which are now in my custody as clerk of said court.

There is also annexed to and transmitted with such transcript of record the writ of error and the citation issued and allowed in this case.

In testimony whereof, I have hereunto signed my name and affixed the seal of said court, at Cleveland, in said district, this 28th day of July, A. D. 1922, and in the 146th year of the independence of the United States of America.

B. C. MILLER, *Clerk.*

[SEAL.] By M. E. BAUMAN, *Deputy Clerk.*

45 PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Cause argued in part December 6, 1922.

Before DENISON and DONAHUE, Circuit Judges, and PECK, District Judge.

These causes are argued together by Mr. Berkeley W. Henderson, assistant United States attorney, and are continued until to-morrow for further argument.

Further argued and submitted Dec. 7, 1922.

These causes are further argued by Mr. Berkeley W. Henderson, assistant United States attorney, and by Mr. C. M. Charest, special

attorney, Bureau of Internal Revenue, on behalf of the plaintiff in error, and by Mr. John G. White on his own behalf and by Mr. Charles P. Hine on behalf of Louis Stearn and are submitted to the court.

46 United States Circuit Court of Appeals for the Sixth Circuit.

Judgment.

Filed Jan. 9, 1923.

Error to the District Court of the United States for the Northern District of Ohio. This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be and the same is hereby affirmed.

47 [File endorsement omitted.]

Nos. 3759 and 3790.

United States Circuit Court of Appeals, Sixth Circuit.

HARRY H. WEISS, COLLECTOR OF INTERNAL Revenue for the Eighteenth District of the State of Ohio, plaintiff in error. vs. LOUIS STEARN, DEFENDANT IN ERROR. HARRY H. WEISS, COLLECTOR OF INTERNAL Revenue for the Eighteenth District of the State of Ohio, plaintiff in error, vs. JOHN G. WHITE, DEFENDANT IN ERROR.	Error to the United States District Court for the Northern District of Ohio, Eastern Division.

Opinion.

Filed January 9, 1923.

Submitted December 7, 1922; decided January 9, 1923.

Before DONAHUE and DENISON, Circuit Judges, and PECK, District Judge.

PECK, District Judge: The question involved in these cases is whether the defendants in error were, by the District Court, properly regarded, for the purposes of income taxation under the revenue law of 1916 (39 Stats. 757) as having disposed with profit of only one-half of their respective stock holdings in the National Acme

Manufacturing Company, or whether they should have been considered as having so disposed of the entirety.

The transaction in question was had pursuant to a contract between the stockholders and Eastman, Dillon & Company, by the first paragraph of which the former apparently agreed to sell, and the latter to buy, the stock "at and for the price of three hun-
48 dred dollars ($300) per share, payable, one-half in cash and one-half in securities, as hereinafter set forth." But the real transaction specifically required by the subsequent provisions of the contract and actually consummated was as follows:

The stockholders delivered all of their stock to an intermediary, the Cleveland Trust Company, in trust. For each share so deposited they were to, and later did, receive $150 cash and five shares of new stock of the nominal par value of $50 each, but actually valued at $30 per share for the purposes of the bargain, being, in the aggregate, one-half (250,000 shares) of the stock of a new corporation formed to take over the business. Eastman, Dillon & Company, in order to acquire the other half of the stock of the new corporation, paid to the trustee $7,500,000, being at the rate of $30 per share for 250,000 shares. The vendors and vendees then proceeded to organize the new corporation under the laws of the same State, Ohio, with the same powers and the same name, except for the dropping of the word "Manufacturing." Its capital stock, $25,000,000, was five times that of the old concern, and was divided into shares of the denomination of fifty, instead of one hundred, dollars each, as theretofore. Accordingly there were ten $50 shares of the new for each $100 share of the old stock. The new corporation issued all of its stock to the trustee in exchange for all the assets subject to the liabilities of the old company. The trustee delivered one-half (250,000) of the shares of the new stock to Eastman, Dillon & Company, in consideration of the $7,500,000 paid in, and distributed pro rata among the old stockholders, the other half, 250,000 shares, and the $7,500,000 at the agreed rate of $150 and five shares of the new for each share of the old stock. The old company was then dissolved and the new corporation continued business under the same management.

The net results, putting to one side for the moment the matter of reincorporation, were that the capital stock of the concern was increased fivefold, the face value of the shares cut in half, and that the old stockholders sold Eastman, Dillon & Company one-half of their respective holdings at the price of $30 per share for the new stock. The income tax on such profit as was made on that half which was so sold was paid by defendants in error, who were among the old stockholders. They were, however, further compelled
49 to pay a like tax because of the receipt of the other half of the new stock in exchange for the old, the Government claiming that they made the same gain thereby as upon the half which they had sold, and for the recovery of this they sued and had judgment below.

It is clear that the half in question was not sold to Eastman, Dillon & Company. This is true despite the above-quoted language of the first paragraph of the agreement, as substance must dominate form; and what was done, rather than what was agreed to be done, is the final criterion. United States v. Phellis, 257 U. S. at page 172. As to this half, the legal title never went to Eastman, Dillon & Company, nor beyond the Cleveland Trust Company, which held it for the benefit of the old stockholders, in whom the equity continued until the agreed equivalent in new stock was delivered to them and the old stock retired by the dissolution of the old corporation. Therefore, if the transaction as to this half resulted in taxable gain at all, it was not as the consequence of any sale to Eastman, Dillon & Company, but must be looked for in the transaction had between the old stockholders, the trustee, and the corporation.

The old corporation went through the form of an exchange of its assets for the new stock and a distribution thereof among its shareholders as upon final dissolution. There was nothing that can be properly called a sale of the half of the stock under consideration in any aspect of the case. The question to be decided resolves itself, therefore, to this: Is there taxable income to the stockholder in the receipt of shares of greater face value and actually worth more than the cost to him of old shares for which they are exchanged upon the occasion of a reorganization accomplished by the taking down of an old corporate structure and the setting up in its place of a new one with the same powers under the laws of the same State, but having greater capital stock, with a taking over of assets subject to liabilities and a continuance of the business under the same management and name?

It is the present policy of Congress, as shown by the statute now in force, to regard such a transaction as nontaxable (revenue act of 1921, ch. 136, p. 230, sec. 202 [c] [2]), although under the act of 1918 the matter had been made dependent upon the comparative face values of the old and new securities (40 Stats. 1060, sec. 202 [b]). The law of 1916, however, under which this case arises, did not deal expressly with exchanges of stock upon corporate reorganizations, and the case is left to be determined upon the
50 general definition of that which is taxable as "including gains, profits, and income derived from * * * business, trade, commerce, or sales or dealings in property, whether real or personal * * * also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever." (Section 2 [a].)

Except for change of corporate entity there was here a continuance of the same concern. The assets were the same, and the stockholders (assuming the sale of the other half to have been consummated) were the same, and in the same proportions; the domicile, the powers, the name, substantially, and the corporate obligations were all left as before. The same ends might have been achieved

by an amendment of the articles of incorporation providing for the increase of the capital stock, the reduction of the face value of its shares, and the change of name. Had this method of accomplishing the identical result been pursued, the increase in face value of the new certificates issued to the holders in exchange for the old would have been plainly a mere stock dividend, nontaxable under Eisner v. Macomber, 252 U. S. 189. Therefore, if the transaction be taxable it must be because of the giving up of the old and the taking on of the new charter. It is true that a new corporate being has intervened, but where a corporate entity has been found to be a mere matter of form, it has been disregarded in similar transactions in respect to income taxation. Southern Pacific Co. v. Lowe, 247 U. S. 330; Gulf Oil Co. v. Llewellyn, 248 U. S. 71; Alpha Portland Cement Co. v. United States, 261 Fed. 339; although it is not so when it is a matter of substance. Eisner v. Macomber and United States v. Phellis, supra. The latter case, strongly relied upon by plaintiff in error, does not present a parallel situation. There the surplus had been separated from the capital for the purpose of distributing it among the stockholders in the form of the stock of a new corporation to which the assets were conveyed. But the old corporation continued to exist, its stock remained outstanding, and the segregation of capital from surplus was accomplished by setting over to it assets equal to its capital stock and capabale of returning future dividends to its stockholders. In that state of affairs the Supreme Court said of the stockholder: " * * * he could sell his entire portion or any of it " (i. e. his dividend) " without parting with his
51 capital interest in the parent company, or affecting his proportionate relation to the interests of other stockholders. Whether he sold the new stock for money or retained it in preference, in either case when he received it he received as his separate property a part of the accumulated profits of the old company in which previously he had only a potential and contingent interest." Rockefeller v. United States, 257 U. S. 176, likewise involved a distribution of the stock of a corporation created to take over part of the surplus of the parent corporation while the existence of the latter continued. Peabody v. Eisner, 247 U. S. 347, exhibited the case of a distribution, as a dividend, of the stock of another corporation held by the parent company. In each of those cases there was a segregation of accumulated surplus and a distribution of it in the stock of a corporation other than the parent company, both corporations continuing to exist.

In the present case there has been no attempt on the part of the concern to segregate or distribute its surplus, but merely a reorganization accompanied by a stock dividend. It has not been divided into two corporations, one to hold the capital, the other to take the earnings, as in the cited cases. The old charter was surrendered when the new one was taken. The venture of the stockholder in the hazard of the business continues undivided. He has not drawn out his profit. His investment is still entirely in the same

enterprise, albeit represented by new certificates, yet essentially the same. For these reasons it is concluded that the distribution upon reorganization of the new stock in exchange for the old did not involve taxable income. Accordingly the judgment of the District Court is affirmed.

52 United States Circuit Court of Appeals for the Sixth Circuit.

Clerk's certificate.

I, Arthur B. Mussman, clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of Harry H. Weiss, Collector, etc., vs. Louis Stearn, No. 3759, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said court, at the city of Cincinnati, Ohio, this 20th day of March, A. D. 1923.

[SEAL.] ARTHUR B. MUSSMAN,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

53 Writ of certiorari and return.

Filed July 5, 1923.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, greeting:

Being informed that there is now pending before you a suit in which Harry H. Weiss, collector of internal revenue for the eighteenth district of the State of Ohio, is plaintiff in error, and Louis Stearn is defendant in error, No. 3759, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Northern District of Ohio, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Su-

54 preme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the honorable William H. Taft, Chief Justice of the United States, the twenty-third day of June, in the year of our Lord one thousand nine hundred and twenty-three.

[SEAL.] WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, *ss:*

I, Arthur B. Mussman, clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the transcript of the record of the proceedings of this court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this court.

In pursuance of the command of the foregoing writ of certiorari I now hereby certify that on the 3rd day of July, A. D., 1923, there was filed in my office a stipulation in the above-entitled case in the following words, to wit:

In the Supreme Court of the United States, October Term, 1922.

[Title omitted.]

Stipulation as to return to writ of certiorari

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the United States Circuit Court of Appeals for the Sixth Circuit to the writ of certiorari granted therein.

WM. J. HUGHES,
For the Solicitor General.
THOMPSON, HINE & FLORY,
Cousel for Respondent.

JUNE 29, 1923.

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof. Witness my official signature and the seal of said Circuit Court of Appeals at the city of Cincinnati, in said circuit this 3rd day of July, A. D. 1923.

[SEAL.] ARTHUR B. MUSSMAN,
Clerk United States Circuit Court
of Appeals for the Sixth Circuit.

55 [File endorsement omitted.]

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1924